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No. 73-840

In the
Supreme Court of the United States
OCTOBER TERM, 1973

THOMAS MICHAEL RIELY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Thomas Michael Riely, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 9, 1973.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in the Appendix attached hereto, *infra*, pages 1a-9a.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed and entered on August 9, 1973. The petition for rehearing was denied on October 9, 1973. This Petition will be timely filed on or before November 28, 1973, one

extension of time from November 8, 1973, until November 28, 1973 having been granted.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the Petitioner was denied due process of law contrary to the requirements of the Fifth Amendment to the United States Constitution:

1) Whether Petitioner stated a *prima facie* case?

2) Whether the Local Board found that a *prima facie* case was stated?

3) Whether once a *prima facie* case has been presented, a statement of reasons is necessary to comply with procedural due process of law?

STATUTES INVOLVED

462(a) 50 U.S.C. App. provides in material part as follows:

> ". . . any other person charged as herein provided with the duty of carrying out of any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment . . . or a fine . . . or by both such fine and imprisonment. . .".

SELECTIVE SERVICE REGULATIONS INVOLVED

32 C.F.R. 1625.2

32 C.F.R. 1625.4

32 C.F.R. 1626.12

STATEMENT OF THE CASE

Shortly after his eighteenth birthday, in 1964, the Petitioner duly registered with Illinois Selective Service local board No. 111. On November 18, 1965, the Petitioner was granted a II-S deferment by virtue of his enrollment at Southern Illinois University. C.C.A. 13.*

On May 19, 1967, the Petitioner submitted SSS Form 150, special form for conscientious objectors to his local board, requesting that they classify him I-O. C.C.A. 8-11. In his SSS Form 150, the Petitioner stated that he believed in a Supreme Being and stated "I believe that man, as part of the universe, was created to live together and make achievements which will better the entire human race, and under no circumstances become involved in organized war." He stated that he believed in non-violent force only when the results are beneficial to mankind, but that he did not believe in organized violent force such as that used by armies in wars. In describing those actions and behavior in his life which demonstrated the consistency and depth of his religious convictions, the Petitioner listed "a non-violent way of life. A rejection of violence out of love." C.C.A. 8-9.

On August 29, 1967, without comment, the local board classified the Petitioner I-A. He requested a timely personal appearance before the local board which was scheduled for November 21, 1967. On November 17, 1967, the local board received correspondence from the Petitioner in which he explained that his distance from the local board and inability to return on November 21, 1967 would preclude his presence at the scheduled personal appearance. GXA 51.** The local board acknowledged the cor-

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* "CCA" refers to Circuit Court of Appeals Appendix.

** "GXA" refers to Government's Exhibit A at trial, the Selective Service record of the Petitioner.

respondence and responded asserting that a new date for a personal appearance would be scheduled. GXA 53.

By letter dated February 13, 1968, the local board rescheduled the Petitioner for a personal appearance for February 20, 1968 at 7:30 P.M. Petitioner's mother, by letter dated February 18, 1968, notified the local board that her son was again distant from the local board, attending Southern University, and would be unable to respond to the appointment for a personal appearance. GXA 54. In both the Petitioner's letter of November 17, 1967 and his mother's letter of February 18, 1968, the local board was apprised of time periods during which he would be in the area of his local board, and an appearance before them was requested during those time periods.

On March 18, 1969, without further attempt to schedule a personal appearance, the local board forwarded the Petitioner's selective service file to the State Appeal Board. On July 8, 1969, the State Appeal Board classified the Petitioner I-A without stating any reasons for that classification. C.C.A.13, 14.

The Petitioner was mailed a I-A classification card, and on July 22, 1969, the local board received correspondence from him in which he contested the validity of the I-A classification and requested an "appeal" thereof. C.C.A.15. On July 23, 1969, the local board notified the Petitioner that his absences at the two scheduled personal appearances constituted a waiver of his right to a personal appearance and that his file was therefore sent to the Appeal Board.

On July 29, 1969, the local board received correspondence from the Petitioner in which he further attempted to explain his reasons for being unable to attend the two

previously scheduled personal appearance dates and in which he elaborated on the nature of his beliefs and asserted that they would preclude him from submitting to induction. C.C.A. 17-19.

On August 11, 1969, after receipt of an induction order to report on August 21, 1969, the Petitioner corresponded with the State Director explaining to him that he felt that he had been erroneoulsy denied an opportunity for a personal appearance before the local board and pointing out that his religious beliefs precluded his entering on active duty in the Armed Forces. C.C.A. 21-22. The State Director responded, taking essentially the same position taht the local board had taken. C.C.A. 23.

The Petitioner was unable to report for induction on August 21, 1969, and so informed his local board. He was reordered by letter to report for induction on October 28, 1969, but failed to report for induction on that date pursuant to which action prosecution was instituted. On February 11, 1971 an indictment was filed. On April 20, 1971, the Petitioner entered a plea of not guilty. A trial was held, and on June 5, 1972, the Petitioner was found guilty. On July 6, 1972, he was sentenced to a three year prison term.

On appeal the Seventh Circuit Court of Appeals affirmed. A petition for rehearing was filed and was denied on October 9, 1973. The Petitioner is currently free on a $10,000 surety bond pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

The Court is being asked to determine whether Petitioner was denied procedural due process of law contrary to the requirements of the Fifth Amendment to the United States Constitution. To decide that issue, this Court must first decide whether a *prima facie* case for classification as a conscientious objector was presented by the Petitioner to his Local Selective Service Board or whether the Local Board found a *prima facie* case to exist. Once the Court decides that Petitioner submitted a *prima facie* case, or that the Local Board so decided, the remaining inquiry is whether or not the Selective Service accorded the Petitioner his procedural rights in refusing to grant the requested status. It will be demonstrated below, that not only did the Petitioner present a *prima facie* claim for classification as a conscientious objector, but that the Local Board also found that a *prima facie* claim existed. Yet both the Local and Appeal Boards denied the Petitioner his procedural rights by failing to state reasons for denying the requested status, thereby invalidating the induction order which was the basis for Petitioner's conviction for failure to report for induction into the Armed Forces of the United States.

I

THE PETITIONER STATED A PRIMA FACIE CASE

In *Clay* v. *United States*, 403 U.S. 698 (1971), this Court set forth a three-fold test to determine qualification for classification as a conscientious objector:

> "[1] He must show that he is conscientiously opposed to war in any form. Gillette v. United States, 401 U.S. 437. [2] He must show that this opposition is based upon religious training and belief, as the

term has been construed in our decisions. United States v. Seeger, 380 U.S. 163; Welsh v. United States, 398 U.S. 333. [3] And he must show that his objection is sincere. Witmer v. United States, 348 U.S. 375." 403 U.S. at 700.

The Petitioner set forth his beliefs as follows:

(1) After voicing a belief in a Supreme Being he stated "I believe that man, as part of the universe, was created to live together and make achievements which will better the entire human race and under no circumstances become involved in organized war."

(2) He unreservedly subscribed to the statement on SSS Form 150 which certified that his opposition was founded upon "religious training and belief."

(3) In addition to the above he asserted that his behavior reflected "a non-violent way of life [and] a rejection of violence out of love."

Nevertheless, the Court of Appeals in comparing Petitioner's position to the criteria laid down by this Court in the authorities cited in *Clay* held as follows:

> Appellant's Form 150 was plainly insufficient on its face. Making the dubious assumption that the unsupported, vague assertion in the form may be interpreted as an expression of opposition to "war in any form", see Gillette v. United States, 401 U.S. 437, 444-446, appellant's statement wholly failed to satisfy the statutory requirement that his claim be rooted in "religious training and belief," even as that phrase has been construed in United States v. Seeger, 380 U.S. 163, and Welsh v. United States, 398 U.S. 333. In our opinion, appellant's assertions were not the kind of "non-frivolous allegations of facts" that would have required the board to reopen his classification under the test stated by the Supreme Court in Mulloy v. United States, 398 U.S. 410, 416. Slip Opinion at p. 3.

Just as the Local and Appeal Boards failed to do so, the Court of Appeals failed to tell us how the Petitioner's beliefs were not rooted in religious training and belief in the face of Petitioner's concise but unequivocal assertion that his beliefs were so rooted. It is incredulous that the Court of Appeals could find that the Petitioner's beliefs were not the kind of "non--frivolous allegations of facts" under this Court's test stated in *Mulloy*. This Court's summary of Mulloy's beliefs reflects that although Mulloy gave a more detailed account of the evolution of his beliefs, those beliefs in substance were in accord with those of the Petitioner.

Furthermore, this Court noted with approval in Mulloy the Seventh Circuit Case of *United States* v. *Freeman*, 388 F.2d 246 (7th Cir. 1967). In *Freeman* the Court found that the registrant's Form 150 was sufficient to state a *prima facie* case, requiring reopening of his classification where he had simply stated that he believed in a Supreme Being, that he was a member of the Islam Religion and that by reason of his religious training and belief he was opposed to participation in war in any form. In the dissent of Judge Knoch, Freeman's Form 150 is described. 388 F.2d 246, 250-251. If anything his answers were even less detailed than those of the Petitioner. Freeman had no supporting letters, he said he was not a member of a religious sect or organization and he had not given public expression to his views.

The Court of Appeals also determined on page 3 of its opinion that Petitioner's statements did not meet the test of *Welsh*. In his original application for classification as a conscientious objector, *Welsh* stated the following:

> "I believe that human life is valuable in itself; in its living; therefore, I will not injure or kill another

> human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relationship'. On the contrary, *it is essential to every human relationship.* I cannot therefore conscientiously comply with the government's insistence that I assume duties which I feel are immoral and totally repugnant." 398 U.S. at 343.

Petitioner stated the nature of his beliefs as follows:

> "I believe that man as part of the universe was created to live together, make achievements which will better the entire human race and under no circumstances become involved in organized war."

There is no qualitative distinction between the beliefs stated by Petitioner and those stated by Welsh. If Welsh's beliefs qualified, then so do Petitioner's, particularly since Petitioner believes in a Supreme Being and Welsh did not.

II

THE LOCAL BOARD FOUND THAT A PRIMA FACIE CASE WAS STATED

The reopening of Petitioner's classification by the Local Board indicates that the Local Board determined that a *prima facie* claim existed. Such a determination is conclusive unless the only conclusion that the Local Board could have made was that the claim failed to meet the statutory criteria.

Selective Service Regulation 1625.2 provides in part:

> "The Local Board may reopen and consider anew the classification of the registrant (a) upon the written request of the registrant. . ., if such request is accompanied by a written information presenting facts

not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . ." 32 C.F.R. 1625.2.[1]

In the instant case, the reopening by the local board implies that it found that prima facie case existed.[2]

III

Once a Prima Facie Case Has Been Presented, a Statement of Reasons is Necessitated in Order to Comply With Procedural Due Process.

In *Joseph* v. *United States,* 405 U.S. 1006 (1972), this Court vacated the judgment and remanded the case on the basis of a "confession of error" by the Solicitor General. The Solicitor General urged reversal on the basis that the local board had concluded the Petitioner had presented a *prima facie* claim for conscientious objection and that even if said local board's conclusion was erroneous it required a statement of reasons by the local board for denying the conscientious objector claim.

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[1] All C.F.R. citations are to the 1968 edition, which contains all the regulations in effect during the period under consideration.

At page 6 of its opinion the Court of Appeals cited Selective Service Regulation 1625.4 (32 C.F.R. 1625.4), which deals with action to be taken upon a local board's determination that *no* prima facie case exists. Perhaps the Court of Appeal's erronous conclusion at pages 6 and 7 of its opinion that the local board could not conclude on August 19, 1967 that Petitioner's claim demonstrated that he was entitled to exemption, if he was sincere and that he was, in fact, insincere, derives from its erroneous reliance on regulation 1625.4.

[2] The Appellate Court chose to conclude that the local board "erred" procedurally in the reopening, and that aspect of the opinion is discussed, *infra.*

Two justices, while agreeing that the basis advanced by the Solicitor General would require reversal, argued that regardless of whether or not a *prima facie* conscientious objector claim had been presented, neither meaningful administrative nor judicial review was possible absent a local board statement of reasons.[3]

In his memorandum in *Joseph* the Solicitor General urged the following:

> "We might feel otherwise if it could be argued here that there were no grounds for questioning Petitioner's sincerity, so that the only determination that could possibly have been made on this record was that petitioner's claim did not meet the statutory criteria. In such a situation, the board's decision, whether characterized as a refusal to reopen (App. 13-14) or as a denial of exemption after reopening (App. 16-17), would necessarily have been based on a determination that petitioner was not prima facie entitled to conscientious objector status. Consequently, it would not have been obliged to state reasons." Solicitor General's Memorandum at pages 20-21.

The Solicitor General seems to be urging that the Local Board's determination is conclusive and a statement of reasons is necessary unless the claim *on its face* is not sufficient.

Recently the Solicitor General has indicated in a memorandum before this Court what kind of a case conforms to his view of the exception to the Joseph situation. In *Ford* v. *United States*, petition for certiorari pending No. 72-6858 he filed a memorandum in opposition to a petition for certiorari in which he stated:

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[3] 405 U.S. 1006 (Mr. Justice Douglas joined in dissent by Mr. Justice Marshall.)

• • • •

The instant case comes squarely within this exception, and accordingly our confession of error in *Joseph* does no indicate that this case was incorrectly decided.

Petitioner is a self-proclaimed "selective conscientious objector." He never expressed any objection to "war in any form," but only to participating in *"a war I believe to be unjust,"* and he specifically objected to "participation, in any form, in the war effort in Southeast Asia." In these circumstances his sincerity was immaterial, since his claim was patently insufficient. Solicitor General's Memorandum at page 5. [emphasis added][4]

The Petitioner suggests that the distinction suggested by the Solicitor General in *Joseph,* as subsequently qualified in *Ford,* creates a rational distinction whereby a court can conclude that no reasons need be given by a local board upon an "erroneous" reopening of a classification. Ford's SSS Form 150 on its face said that he was a selective objector. Or, to state it differently, Ford actually said he was

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[4] In a recent case, the Court vacated and remanded despite the Solicitor General's argument that the Petitioner had failed to state a *prima facie* case, and therefore no reopening or ensuing procedural rights need be accorded. *Bush* v. *United States,* ..... U.S. ....., ... U.S.L.W. ..... (No. 73-5054, Nov. 12, 1973). In *Bush* the Solicitor General argued that although the Appellate Court erroneously concluded that Bush had failed to exhaust administrative remedies, the writ of certiorari should have been denied on the basis that Bush's case fell within the exception to *Joseph,* notwithstanding the failure of the Appellate Court to rely on that basis. The Court's attention was directed by the Solicitor General to his *memorandum* in *Ford.* In the instant case, the Appellate Court did rely on the exception to *Joseph,* and the court is therefore called upon to rule upon the error of that reliance.

not qualified for classification as a conscientious objector. Conversely, in the *Joseph* case, even though the Solicitor General maintained steadfastly that Joseph had not presented a *prima facie* case (Solicitor General's memorandum at 14-18), he opined that, where the case presented was not unambiguous, a reopening by the board was conclusive and that thereafter the case must be dealt with as any *prima facie* case would be.

The Solicitor General's memorandum in *Joseph* was brought to the attention of the Seventh Circuit Court of Appeals with respect to a petition for rehearing in a case in which it had already affirmed a conviction. In its original decision on March 8, 1972, the Seventh Circuit observed:

> We cannot agree that defendant unambiguously established a sweeping opposition to all wars in those statements which he made a part of his Form 150. At the Board meeting on November 7, 1968, defendant was again classified I-A. *United States* v. *Hulsey,* 463 F.2d 1071, 1072 (1972).

Yet after being presented with a petition for rehearing, and upon the Government directing the court's attention to the Solicitor General's memoranda in *Joseph* and *Lenhard* v. *United States,* 405 U.S. 1013 (1972), the court reversed itself with no other comments than a citation to this court's decision in those two cases.

Yet the Seventh Circuit in the instant case observed that:

> It is manifest that the board made a procedural error. Either it erroneously made an entry on appellant's record which implied that his classification had been reopened even though the board had not determined that his claim for exemption was sufficient on its face, or else the board erroneously determined that this claim was sufficient and then summarily denied

> the exemption without appraising his sincerity in a personal interview. Quite clearly, the former is the more reasonable interpretion of his record.

Slip opinion at page 6. It is incredible that the same court that held that Hulsey, whose claim it characterized as not "unambiguous", merited a reversal under *Joseph,* also held that your Petitioner, whose brief but unambiguous claim falls within the four corners of Clay,[5] was simply treated "erroneously" by the Local Board.[6]

The Seventh Circuit prior to its deceision in the instant case stated in the case of *United States* v. *Weaver,* 474 F.2d 936 (1973):

> "Whatever our opinion of Weaver's claim set forth in the letter accompanying the blank form 150, we are compelled to assume that the local board considered this sufficient to state a *prima facie* case of conscientious objection. The Board responded to Weaver's letter with a Form 110 and a notification of his right to appeal. Under the regulations in force at the time, this action signified conclusively that the board had reopened Weaver's classification, 32 C.F.R. S1625. 12, a step precluded by regulation unless a prima facie case had been made out." 474 F.2d at 938.

Yet, in the instant case, the court was ready to rule that the Local Board made an "error". In its opinion in the

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[5] See discussion, *supra,* at pp. 6-7.

[6] It should be noted here that the Joseph reasoning is the law of the Seventh Circuit and that that was the premise from which the court reasoned in reaching its decision in the instant case.

> Frankly, we have some difficulty identifying the legal basis for this [referring to Solicitor General's *Joseph* memorandum] analysis. . . . . Nevertheless, since this circuit has accepted it, we must of course, respect it.

Slip Opinion p. 5, n. 4.

instant case the court attempted to distinguish *Weaver* as follows:

> "In *Weaver*, the registrant made a personal appearance before the Board on December 9, 1969, in connection with his request for conscientious objector status. It is entirely possible that Weaver's personal interview caused the board to reach the conclusion that he was sincere."

Slip Opinion at page 17. But the Court in *Weaver* wrote:

> "On November 18, 1969, the board answered by a form letter which notified Weaver of a personal appearance before it on December 9, 1969. Weaver appeared as scheduled and reiterated his request for conscientious objector status. The board refused to hear evidence on this claim, however, since Weaver had not submitted to it a completed Selective Service System Form 150 for conscientious objection. It informed Weaver that a completed Form 150 was a necessary prerequsite to its consideration of a claim for conscientious objection and terminated the interview." 474 F.2d at 937.

It is difficult to understand how the court could conclude that the board in *Weaver* reached the conclusion that Weaver was insincere when it refused to hear evidence on the claim at the personal appearance because he did not complete the SSS Form 150.

Moreover, the most careful reading of the Court of Appeals opinion in the instant case gives no idea of what the Circuit Court relied upon in determining that the Petitioner's claim was insufficient on its face. The Court of Appeals characterized the Petitioner's claim as follows:

(1) ". . . plainly insufficient on its face" Slip Opinion at p. 3.

(2) ". . . failing to meet the statutory requirement that his claim be rooted in 'religious training and belief' . . ." *id.*

(3) ". . . not the kind of 'non-frivolous allegations of facts' that would have required the board to reopen his classification under the test stated by the Supreme Court in *Mulloy* v. *United States*, 398 U.S. 410, 416." Slip Opinion at p. 3.

(4) ". . . did not meet the statutory criteria." *id* at 5.

And the Court of Appeals then concluded that in light of such an insubstantial statement no reasons need be stated by the Local Board as the case falls within the *Joseph* exception.

The fallacy of the court's reasoning is that it assumes its conclusion. All the above enumerated observations of the court are simply various ways of making the unsupported assertion that the claim falls within the *Joseph* exception. The Court of Appeals did not tell us which one of the statutory criteria Petitioner's claim failed to satisfy, and despite the court's conclusions, the Petitioner suggests that no reviewing body can discern with any assurance what basis the court had for holding the Local Board "erred" in reopening Petitioner's case.[7]

It has long been the law that when a registrant files information constituting a *prima facie* case for a con-

[7] The failure of the local board and the appeal board to give any reasons for the denial of petitioner's claim deprived him of any meaningful judicial review of that denial. The inability of the Court of Appeals to cite to any concrete insufficiency in the petitioner's claim emphasizes the inability of any court to give such a review to the decisions of the Selective Service Boards in this cause. See Solicitor General's memorandum in *Lenhard* v. *United States*, 405 U.S. 1013 (1972). *See also, United States* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970).

scientious objector classification, the local board must have a basis in fact for refusal to grant the classification. *Estep* v. *United States*, 327 U.S. 114 (1946); *Dickinson* v. *United States*, 346 U.S. 389 (1953); *Witmer* v. *United States*, 358 U.S. 375 (1955). Yet to uphold the Seventh Circuit's decision in this case would be to hold that, notwithstanding the basis in fact test to be applied when evaluating concedely *prima facie* cases, no such determination is necessary in concluding that no *prima facie* case exists notwithstanding a local board conclusion to the contrary. Such a holding would render the basis in fact test meaningless, for a court could simply declare that no *prima facie* case was stated and avoid the entire analysis. This process is particularly ironic where, as in the instant case, the local board not only concedes a *prima facie* case but also foregoes multiple opportunities to state reasons for denying the claim or to even allude to any basis in fact for denying the claim.

Finally, although it is implicit in the above argument, it is important to note that the Selective Service local and appeal boards failed to give the Petitioner a meaningful appeal, and the Court of Appeals explicitly condoned that treatment. The court, by concluding that the local board erred and that no statement of reasons is necessary after such an erroneous reopening, rendered the procedural rights accorded Petitioner, in this instance a hollow gesture. Procedural due process requires nothing less than that an appeal, once granted, reflect some sort of a reviewing process rather than a series of empty gestures. Selective Service regulation 1626.12 provides as follows:

> The person appealing may attach to his appeal a statement specifying the matters in which he believes

> the local board erred, may direct attention to any information in the registrant's file which he believes that the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

32 C.F.R. 1626.12.

When the defendant has no knowledge of the board's basis for denying his claim, he cannot specify matters in which the local board erred. He cannot tell what information the local board failed to give sufficient weight or failed to consider. He will not even know what information is pertinent. The Appeal becomes a meaningless rubber stamp.

Had the local board even alluded to something in the defendant's file, or some statements by the defendant, or any other relevant fact, he might have been able to present rebuttal testimony at his personal appearance or to present the appeal board with rebuttal statements.

We are faced with the situation where a local board has denied a conscientious objector classification without telling the defendant why. Then after the defendant has refused to accept induction because of his convictions, the government has prosecuted, claiming that alleged facts in the file or the lack of information renders the defendant criminally liable.

By this time it is too late for the defendant to bring forth what might very well be his very logical and satisfying explanation to rebut or explain the alleged lack of a *prima facie* case or basis in fact. If the defendant does bring forth such evidence, it is not admissable because it wasn't before the administrative board.

CONCLUSION

For the reasons jointly and severally ascribed above, the Petitioner respectfully requests that this court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973

No. 72-1709
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS MICHAEL RIELY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 111
RICHARD B. AUSTIN, *Judge.*

ARGUED FEBRUARY 21, 1973 — DECIDED AUGUST 9, 1973

Before STEVENS, *Circuit Judge,* GRANT,* *Senior District Judge,* and GORDON**, *District Judge.*

STEVENS, *Circuit Judge.* Appellant's failure to report for induction on October 28, 1969, was followed by crimi-

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

** District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

nal prosecution, conviction, and this appeal. He contends that his induction order was defective because his local board failed to state reasons for denying him exemption as a conscientious objector on August 19, 1967.

Under the reasoning of our decision in *United States* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970), his contention would fail because his SSS-Form 150 did not describe a belief which on its face fulfilled the legal requirements. He argues, however, that the confession of error by the Solicitor General in *Joseph* v. *United States*, 405 U.S. 1006, as interpreted in *United States* v. *Weaver*, 474 F.2d 936 (7th Cir. 1973), has extended the *Lemmens* rule to cover all unexplained denials of exemption after a reopening that would have been improper unless the registrant stated a *prima facie* claim. As we read the Solicitor General's Memorandum in *Joseph*, it does not go quite that far; moreover, the legal significance of that document is somewhat obscure since the government has not confessed error in this case.

We first consider the case without regard for the *Joseph* Memorandum and then turn to its significance.

I.

Appellant registered in 1964, received a student deferment in 1965, and, in 1966, was classified I-A. On May 19, 1967, he submitted his Form 150 requesting a I-O classification. The form was not supported by any letters or documents, stated that appellant had not given public expression to his views, that there was no individual upon whom he relied for religious guidance, and that he was not a member of any religious sect or organization. The source of his beliefs was described as "deep thinking of the subject matter under the influence of mind expanding drugs." The basis of the claim was stated as a belief "that man, as part of the Universe, was created to live together and make achievements which will better the

entire human race, and under no circumstances become involved in organized war."[1]

Appellant's Form 150 was plainly insufficient on its face. Making the dubious assumption that the unsupported, vague assertion in the form may be interpreted as an expression of opposition to "war in any form," see *Gillette* v. *United States*, 401 U.S. 437, 444-446, appellant's statement wholly failed to satisfy the statutory requirement that his claim be rooted in "religious training and belief," even as that phrase has been construed in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333.[2] In our opinion, appellant's assertions were not

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[1] The only other relevant statements in the form were appellant's answers to questions 5 and 6:

"5. Under what circumstances, if any, do you believe in the use of force;

A. I believe in the use of non-violent force, when the results are beneficial to mankind.
I do not believe in organized-violent-force, such as that used by army's [sic] in wars.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

A. A non-violent way of life. A rejection of violence out of love."

[2] *Seeger* and *Welsh* construed § 6(j) of the Universal Training and Service Act, codified at 50 U.S.C. App. § 456(j). At the time of *Seeger*, that section provided in part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed services of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those, arising from any human relation, but does not

the kind of "non-frivolous allegations of facts" that would have required the board to reopen his classification under the test stated by the Supreme Court in *Mulloy* v. *United States*, 398 U.S. 410, 416.

But since the board did reopen his classification, appellant argues that it could not legitimately deny him an exemption without furnishing a statement of reasons. This argument is not supported by the *Lemmens* analysis.

We first note that the board action under review took place over two years before the statute was amended to require that registrants be furnished a brief written

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[2] (Continued)

include essentially political, sociological, or philosophical views or a merely personal moral code." 62 Stat. 612.

Seeger and *Welsh* disposed of the view that "religious training and belief" required belief in a Supreme Being:

> "We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S. at 165-166.

The specific exclusion of a merely personal moral code was preserved:

"The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being." 380 U.S. at 186. Although Riely signed the printed "Claim for Exemption" on the Form 150, his handwritten descriptions of his beliefs elsewhere in the Form 150 make it clear that his views amounted at best to a "merely personal moral code."

statement of the reasons for adverse Board decisions. See *Fein* v. *Selective Service System*, 405 U.S. 365, 377-378. Although there was no statute or regulation in 1967 requiring that such a statement be furnished; we have nevertheless held, consistently with other circuits,[3] that a statement of reasons is essential if "meaningful" review would otherwise be impossible. *United States* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970. In that case, after carefully establishing the proposition that the registrant had described the type of belief which qualifies for the exemption, see 430 F.2d at 621-622, Judge Fairchild explained the reason for the rule— ". . . the court cannot otherwise determine with any degree of assurance that the decision really made by the Board properly supported the rejection and had a basis in fact." *Id.* at 624.

That reason is inapplicable if the registrant's claim is plainly insufficient on its face. For in such a case his lack of entitlement to the exemption does not depend on the board's appraisal of his veracity. He has the burden of both bringing facts establishing his right to an exemption to the attention of the board and also convincing them of his veracity. As long as the impact of the second issue is meaningless, no purpose would be served by insisting on "meaningful" review of that issue.

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[3] The Solicitor General cites some of the leading cases at pages 12-14 of his memorandum in *Joseph*:

"In recent years, however, as petitioner points out (Pet. Br. 26-28), there has emerged in the courts of appeals a substantial line of authority—beginning essentially with *United States* v. *Haughton*, 413 F.2d 736 (C.A. 9)—holding that the failure of local boards to articulate in writing the bases for their denials of conscientious obector claims is fatal where the information in the Selective Service file shows that the registrant made out a *prima facie* case for exemption. *See, e.g., Scott* v. *Commanding Officer*, 431 F.2d 1132 (C.A. 3); *United States* v. *Stetter*, 445 F.2d 472 (C.A. 5), and the cases collected therein at 482-483 nn. 5-12." Memorandum for the United States on the Merits: *Joseph* v. *United States*, No. 70-251, O.T. 1971, pages 12-14.

Under the law of this circuit as it had developed prior to the confession of error in *Joseph,* the Board's failure to explain its rejection of appellant's conscientious objector claim would have been considered harmless since his claim was insufficient on its face.

II.

Appellant argues, however, that since the board did reopen his classification after he submitted his Form 150, it must have found his claim sufficient on its face, and even if that finding is erroneous, we must accept it. This argument is predicated on the Solicitor General's confession of error in *Joseph* and is supported by this court's recent decision in *United States* v. *Weaver,* 474 F.2d 936 (7th Cir. 1973). *Weaver,* however, is distinguishable on a ground which makes the Solicitor General's *Joseph* analysis inapplicable here.

The approach taken by the Solicitor General in his *Joseph* Memorandum focuses on the actual basis for the board's rejection of a claimed exemption. Under his reasoning, if the board's denial actually rested on a finding of insincerity, the registrant is entitled to meaningful review of that finding even though the board's assumption that a prima facie case was stated is erroneous.[4] That analysis does not require that a statement of reasons be furnished if it is perfectly clear that the board action rested on a determination that the registrant's claim did not meet the statutory criteria.[5]

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[4] Frankly, we have some difficulty identifiying the legal basis to this analysis. It is not supported by statute, regulation, or our reading of *Lemmens,* and does not purport to rest on a constitutional requirement. Nevertheless, since this circuit has accepted it, we must of course, respect it.

[5] "Upon further consideration, however, we [the Solicitor General] now think it more likely that the board in this case did initially determine (albeit erroneously) that the petitioner *prima facie* qualified for conscientious objector status, but denied his claim on grounds of insincerity. • • •

Appellant argues that such a conclusion is foreclosed in this case because the board did reopen his classification,

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[5] (Continued)

"We might feel otherwise if it could be argued here that there were no grounds for questioning petitioner's sincerity, so that the only determination that could possibly have been made on this record was that petitioner's claim did not meet the statutory criteria. In such a situation, the board's decision, whether characterized as a refusal to reopen . . . or as a denial of exemption after reopening . . . would necessarily have been based on a determination that petitioner was not *prima facie* entitled to conscientious objector status. Consequently, it would not have been obliged to state reasons.

"This combination of factors could well have led the local board to doubt the sincerity of petitioner's professed opposition. Whether or not it is enough to provide a 'basis in fact' (50 U.S.C. App. 460(b)(3)) for denial—a question that is not presented in this case—it is, we think, sufficient to foreclose an argument that on this record the only decision that the local board could possibly have reached in this case is that petitioner's claim on its face failed to meet the statutory standard. In such circumstances, we have felt compelled to the conclusion that the local board, because it reopened and classified anew, did in fact initially determine that the claim placed petitioner *prima facie* within the statutory exemption, but then denied him a I-O classification because it disbelieved him.

"D. CONCLUSION ON STATEMENT OF REASONS ISSUE

"It was, therefore, incumbent on the board to state reasons for its denial under Haughton, and related cases (see pp. 12-13 supra). The fact that the courts might later find that the *prima facie* determination was erroneous cannot excuse it from this requirement. The law on this point is directed to the time when the board makes its initial determination. If it concludes, whether rightly or wrongly, that the statutory criteria of conscientious objection have been *prima facie* met, the grounds for its subsequent reclassification must be stated." Memorandum for the United States, *supra*, n.2, pages 19-23.

and under the regulations then in effect, a reopening would have been improper unless the board determined that he had stated a prima facie case for exemption.[6]

It it manifest that the board made a procedural error. Either it erroneously made an entry on appellants record which implied that his classification had been reopened even though the board had not determined that his claim for exemption was sufficient on its face, or else the board erroneously determined that his claim was sufficient and then summarily denied the exemption without appraising his sincerity in a personal interview. Quite clearly, the former is the more reasonable interpretation of this record.

Prior to May 19, 1967, when he submitted his Form 150, appellant was classified I-A. The next entry which appears in his file (SSS Form 100) on August 19, 1967, simply reads, "I-A." App. 13. Since appellant was not invited to appear before the board before August 19, 1967, that entry cannot reasonably support the conclusion that the board simultaneously found (a) that the appellant's claim demonstrated that he was entitled to exemption if he was sincere, and (b) that he was, in fact, insin-

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[6] 32 C.F.R. § 1625.4 then provided in part:

"When a registrant, any person who claims to be a dependent of a registrant any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification." 32 C.F.R. § 1625.4 (revised as of January 1, 1968).

cere.[7] We are persuaded, to quote the Solicitor General, "that the only determination that could possibly have been made on this record was that petitioner's claim did not meet the statutory criteria. In such a situation, the board's decision, whether characterized as a refusal to reopen . . . or as a denial of exemption after reopening . . . would necessarily have been based on a determination that petitioner was not *prima facie* entitled to conscientious objector statuts. Consequently, it was not obliged to state reasons." Memorandum for the United States, *supra*, n.2, page 21.

In *Weaver* the registrant made a personal appearance before the board on December 9, 1969, in connection with his request for conscientious objector status. It is entirely possible that Weaver's personal interview caused the board to reach the conclusion that he was insincere.[8] Under the Solicitor General's reasoning in *Joseph*, the registrant was entitled to meaningful review of that conclusion, and the failure to furnish a statement of reasons for the board action dictated reversal of Weaver's conviction. But in this case, since there was no personal appearance in connection with appellant's request for conscientious objector status, and the entire record before the board relating to that request was limited to the Form 150 itself, the Solicitor General's analysis dictates affirmance.

The judgment is AFFIRMED.

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[7] It should be noted that various grounds for questioning appellant's sincerity which appear in his file after August 19, 1967, shed no light on the board's action on that date—thus we attach no significance to the suggestion that appellant later claimed to be a minister, to be insane, to be physically unfit for service, to be a student, or to his failure to attend scheduled personal appearances before the board.

[8] The same circumstance was present in *United States* v. *Hulsey*, 463 F.2d 1071, 1075 (7th Cir. 1972), on which *Weaver* relied.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SETEMBER TERM, 1972, JANUARY SESSION, 1973

No.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS MICHAEL RILEY,
Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division
(No. 71 CR 111)

OCTOBER 9, 1973

This cause came on to be heard on the briefs and transcripts of the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be and the same is hereby affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

OCTOBER 9, 1973

Before

Hon. JOHN PAUL STEVENS, Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge

Hon. MYRON L. GORDON, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 72-1709 vs.
THOMAS MICHAEL RILEY,
Defendant-Appellant.

ORDER

Judge Stevens, Grant and Gordon having voted to deny the petition for rehearing, and no judge in regular active service having called for a vote on the suggestion for rehearing en banc, the petition for rehearing is denied.

SELECTIVE SERVICE REGULATIONS INVOLVED

The regulations which are involved and which shall be cited and quoted herein are from the Code of Federal Regulations, Title 32 which was revised subsequent to the 1971 reenactment of the Military Selective Service Act. Citations will be to prior regulatory sections with reference to the pertinent executive orders.

32 C.F.R. §1622.1(c) (1951):

> *1625.2 When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's statuts resulting from circumstances over which the registrant had no control.
>
> *1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.*—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the

current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

1626.12 Statement of Person Appealing.—The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

SUPREME COURT, U. S.
APR 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-840

In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS MICHAEL RIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-840

THOMAS MICHAEL RIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his conviction for failing to report for induction should be reversed under the reasoning of the government's confession of error in *Joseph* v. *United States,* 405 U.S. 1006, because his claim to exemption as a conscientious objector was denied by the local board without a statement of reasons.

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having failed to report for induction, in violation of 50 U.S.C. App. 462. He was sentence to three years' imprisonment. The court of appeals affirmed (Pet. App. A 1a-9a).

Petitioner registered with the Selective Service System on June 1, 1964, and was classified II-S (A 11).[1] He did not claim to be a conscientious objector at that time (A 7).

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[1] "A" designates petitioner's Selective Service File.

After several renewals of his student classification, petitioner was classified I-A on November 17, 1966 (A 11), and was subsequently ordered to report for his physical examination on May 17, 1967 (A 11, 23). He reported as ordered and was found fully qualified for military service (A 28, 29).

On May 19, 1967, two days after his physical examination, petitioner filed Selective Service Form 150, application for classification as a conscientious objector (A 11, 25-27). On this form, petitioner stated that he was not a member of any religious organization but that he believed in a Supreme Being, and wrote: "I believe that man, as part of the universe, was created to live together and make achievements which will better the entire human race, and under no circumstances become involved in organized war" (A 24). In response to the question about the origin of his beliefs, petitioner wrote: "I acquired these beliefs in the fall of 1966, by deep thinking of the subject under the influence of mind expanding drugs" (A 25). He stated that he relied on no one for religious guidance and that he had never made any public expression of his conscientious objector beliefs. He described the actions and behavior that most conspicuously demonstrated the consistency and depth of his religious convictions as "[a] non-violent way of life. A rejection of violence, out of love" (A 25). Petitioner stated that he believed in the use of non-violent force, when the results were beneficial to mankind, but that he did not believe in organized violent force such as that used by armies in war (A 25). He identified his brother and a friend as persons who could attest to the sincerity of his beliefs.

On August 29, 1967,[2] the local board, without comment, again classified petitioner I-A (A 11). Petitioner requested a personal appearance and appeal (A 11, 47-48), and a personal appearance was scheduled for November 21, 1967 (A 50). On November 17, 1967, the local board received a letter from petitioner in which he stated that he would be unable to attend the November 21 appearance because he would be out of town on that date. Petitioner requested another appearance date (A 51). His personal appearance was re-scheduled for February 20, 1968 (A 53). By letter dated February 18, 1968, petitioner's mother informed the board that petitioner was away at school and would be unable to appear on February 20, 1968, as scheduled (A 54).

The selective service file reveals no further communication between petitioner and the local board until March 18, 1969, when the local board forwarded petitioner's file to the appeal board and informed petitioner of this action (A 11, 56). Petitioner submitted no additional information, and on July 8, 1969, the appeal board, without comment, classified petitioner I-A (A 11, 57).[3] The file was returned to the local board and, after one delay at his request, petitioner was ordered to report for induction on October 28, 1969 (A 87). On that date petitioner failed to report as ordered, and his indictment and conviction followed.

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[2]The court of appeals opinion incorrectly states that this action occured on August 19, 1967 (Pet. App. 8a-9a).

[3]When informed of the appeal board's action, petitioner wrote to the local board and complained that he had been denied a personal appearance (A-58). In response, his file was forwarded to the state director (A-69), who reviewed the actions of the local board and found them unobjectionable (A-70).

1. In *Joseph* v. *United States*, remanded for reconsideration in light of the Solicitor General's position, 405 U.S. 1006, we acknowledged that when a registrant presents a *prima facie* claim for exemption as a conscientious objector, a statement of the reasons for rejection of the claim is essential for adequate administrative and judicial review, and that the failure to provide such a statement of reasons would vitiate a subsequent induction order (G. Mem. 12-14).[4] We further conceded in *Joseph* that, although we did not believe that *Joseph* had presented a *prima facie* claim, "we [thought] it more likely that the board * * * did initially determine (albeit erroneously) that petitioner *prima facie* qualified for conscientious objector status, but denied his claim on grounds of insincerity" (G. Mem. 19-20). This conclusion was compelled by the fact that the local board reopened Joseph's classification--a procedure which it was not supposed to employ in the absence of a finding that the claim was *prima facie* valid, 32 C.F.R. 1625.4, and by the fact that Joseph's file disclosed grounds for questioning his sincerity (G. Mem. 20-21). Considering both the ambiguous nature of Joseph's claim and the evidence concerning insincerity, we felt constrained by the presumption of administrative regularity, in the particular circumstances of that case, to treat Joseph's claim as *prima facie* valid, and the board's decision as based on the conclusion that Joseph was insincere. We therefore conceded that the failure to provide a statement of reasons for the classification rendered the reclassification invalid (G. Mem. 19-20).

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[4]"G. Mem." refers to the government's memorandum on the merits in *Joseph* v. *United States*, No. 70-251.

However, we explicitly stated that our concession would not apply in all situations of failure to state reasons for a classification. We said (G. Mem. 20-21):

> We might feel otherwise if it could be argued here that there were no grounds for questioning petitioner's sincerity, so that the only determination that could possibly have been made on this record was that petitioner's claim did not meet the statutory criteria. In such a situation the board's decision, whether characterized as a refusal to reopen or as a denial of exemption after reopening would necessarily have been based on a determination that petitioner was not *prima facie* entitled to conscientious objector status. Consequently, it would not have been obliged to state reasons [citations omitted].

The court of appeals here correctly concluded that petitioner's claim for conscientious objector deferment was clearly insufficient on its face and that the board did not deny his claim on grounds of insincerity.[5]

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[5]In *Joseph*, as here, the board denied the registrant's claim before granting him an interview. But Joseph's file indicated that a classification questionnaire he submitted almost a year after he became a Muslim did not state that he was a conscientious objector, and he did not assert late crystallization. He had also expressed an interest in service in the Armed Forces in the course of an interview to determine his psychological fitness for service about four months before claiming conscientious objector status. He submitted no references or letters attesting to his sincerity, and stated his religious convictions were evidenced by his ability to give up smoking (G. Mem. 21). In contrast, petitioner asserted that his beliefs crystallized in the fall of 1966, after his original registration in which he did not claim to be a conscientious objector. There were no inconsistent statements in his file, and he identified two persons who could attest to the sincerity of his beliefs. Thus, unlike *Joseph*, this is not a case in which the board could reasonably have concluded on the record before it, without a personal interview, that the registrant had presented a *prima facie* claim but was insincere.

The instant case thus comes within the exception to our concession in *Joseph*. Petitioner's arguments are fully answered in the opinion of the court of appeals, on which we here rely.[6]

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[6]In *Cale* v. *Volatile*, 465 F.2d 1110 (C.A. 3), the court of appeals reversed a denial of a writ of habeas corpus, holding that the Selective Service System processing of Cale was defective because the board gave no timely statement of reasons for denying his claim for an occupational deferment. The court accepted Cale's contention that "by virtue of the local board's reopening of his classification * * * we must conclude as a matter of law that the board found that a *prima facie* case had been established." 465 F.2d at 1116. It noted the contention had the "apparent endorsement of the Solicitor General," and concluded that [i]f this was the position taken by the government in confessing error in *Joseph* * * * basic maxims of equality of justice compel us to require the government to maintain a consistent position in the case at bar." *Id.* at 1117. We believe the court felt compelled to reach this conclusion only because it overlooked the reservation in our memorandum in *Joseph* noted above; had that reservation been pointed out, we believe the result would have been the same as in the instant case.

In any event, the Military Selective Service Act was amended in 1971 by the addition of a requirement that boards provide, on request, a statement of the reasons for any decision adverse to a registrant's claim. Pub. L. 92-129, 85 Stat. 353; 50 U.S.C. App. (Supp. 1972) 471a(b)(4). Therefore, even if the Third Circuit should adhere to its incorrect interpretation of our position in *Joseph*, only a limited number of cases involving pre-1971 board decisions, would be affected.

This same issue was involved in *Ford* v. *United States*, 478 F. 2d 169 (C.A. 1), certiorari denied, 414 U.S. 872, and our memorandum in opposition pointed out the apparent inconsistency of the First Circuit's holding in that case with *Cale* (Mem., p. 7). The Court nevertheless concluded that the issue did not warrant certiorari; we submit that the same conclusion is appropriate here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.